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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALAN JARDINE,

Plaintiff and Appellant,

v.

MIKE LOVE, et al.,

Defendants and Respondents.

B161099

(Los Angeles County
Super. Ct. No. BC253348)

APPEAL from a judgment of the Superior Court of Los Angeles County.
James R. Dunn, Judge. Reversed and remanded with instructions.

Jeffrey S. Benice for Plaintiff and Appellant.

Flynn & Stillman, Philip H. Stillman; McPherson & Kalmansohn and
Edwin F. McPherson for Defendants and Respondents.

Appellant Al Jardine (“Jardine”) appeals from the judgment entered upon the trial court’s order sustaining the demurrer of respondents Mike Love, Brian Wilson, Melinda Wilson, Bernard Gudvi, The Carl Wilson Trust, and Brother Records, Inc. The court dismissed the case, finding Jardine’s complaint was barred by the principles of collateral estoppel and res judicata based on a previous federal court action between the parties. On appeal, Jardine argues neither res judicata nor collateral estoppel apply to his claims, since he is claiming violation of a different primary right, and the issues underlying his claim were not decided by the federal court in the previous case brought by respondents against him. Respondents argue both res judicata and collateral estoppel apply, as his present claim arises out of the same facts as his counterclaim in the previous action, and the issues underlying his present claim were decided by the federal court when it dismissed his affirmative defenses in the previous action. We find the trial court incorrectly applied the transactional analysis theory of res judicata in sustaining the demurrer as to the individual respondents. We further find the issues underlying Jardine’s present claim were never adjudicated by the federal court. We therefore reverse.¹

FACTUAL AND PROCEDURAL HISTORY

This appeal arises out of a dispute between appellant Jardine and respondents Mike Love (“Love”), Brian Wilson, Melinda Wilson, Bernard Gudvi, The Carl Wilson Trust, and Brother Records, Inc. (“BRI”) (collectively, “respondents,” unless otherwise individually designated). Jardine was one of the founding members of the world-renowned singing group known as “The Beach Boys,” and performed with various incarnations of the group until approximately early 1998, when Love declared he no

¹ Jardine’s complaint asserted two causes of action one for breach of fiduciary duty and a second for declaratory relief. The court below dismissed both claims. On appeal, Jardine is challenging the court’s order only with respect to the breach of fiduciary duty cause of action. Consequently, the court’s order dismissing the declaratory relief cause of action stands.

longer wanted to appear onstage with Jardine. BRI, which was formed by the founding members of the group in or about 1974, and which owned the rights to the trademarked name “The Beach Boys,” then voted to give Jardine, Love, and Brian Wilson, the surviving founding members of the group, each a non-exclusive license until December 31, 1999, to tour separately as “The Beach Boys.”

BRI sent Jardine a contract outlining the terms of the license agreement, which he eventually signed and returned to BRI for signature. However, BRI demanded further assurances from Jardine that he would meet the conditional terms of the contract, and refused to sign until such assurances were received. Jardine apparently failed to provide such assurances, but began touring under the name “Beach Boy Family and Friends.” BRI then sued Jardine in federal court, seeking to prevent Jardine from using the name “The Beach Boys,” or any form thereof.

Jardine asserted counterclaims against BRI for breach of employment contract, breach of license agreement, and declaratory relief. Later Jardine sought to amend his answer and counterclaims to include a counterclaim against BRI and third-party claims against BRI’s directors for breach of fiduciary duty. However, Jardine’s motion for leave to amend was denied by the court on the ground that granting the motion would have caused an undue delay in the proceedings. (*Brother Records, Inc. v. Jardine* (2003) 318 F.3d 900, 911.) Jardine’s original counterclaims were either dismissed by the federal court in its final judgment or declared moot (with respect to the breach of license claim).

Jardine then filed a complaint in state court against respondents for breach of fiduciary duty. He alleged respondents, acting as majority shareholders and directors of BRI, breached the fiduciary duties they owed to Jardine as a minority shareholder when they turned over control of the business to Love, began to exclude Jardine from live appearances and concerts, and refused to pay Jardine his share of receipts from performances of The Beach Boys in which he was not allowed to take part.

Respondents filed a demurrer to Jardine’s complaint, arguing Jardine was raising issues decided in the federal action, and under the transactional analysis theory, his claims were barred by the doctrines of res judicata and collateral estoppel since they

arose from the same acts. Jardine responded that the primary rights theory, and not the transactional analysis theory, applied in California state court. He argued that under the primary rights theory his claims were not barred, since his primary right in the federal court lawsuit was the right to perform under his employment contract with BRI, while his primary right in the state court lawsuit was the right to have respondents perform rather than breach the fiduciary duties they owed to Jardine as a minority shareholder in BRI.

Although the trial court agreed Jardine was claiming a different primary right, it nevertheless sustained respondents' demurrer with leave to amend² on the ground that the issues underlying the breach of fiduciary duty claim had already been decided in the federal court action.³

Jardine timely appeals.

DISCUSSION

I. The Court Erred in Sustaining the Respondents' Demurrer.

A. Standard of Review.

In *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, the court set forth the appropriate standard of review on a order sustaining a demurrer: “‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of law or fact. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a

² Jardine decided not to amend his complaint and the demurrer subsequently became a final judgment.

³ Jardine's complaint also sought a declaratory judgment that he was entitled to 75 percent of the settlement proceeds received by BRI in an unrelated action for defamation. The trial court held the demand was premature and that a suit for damages was an adequate remedy, and Jardine does not contest that ruling on appeal.

demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action.”

B. The Trial Court Applied An Incorrect Legal Standard In Determining The Issue of Claim Preclusion.

Res judicata (also referred to as claim preclusion) operates as a bar to maintaining a second suit between the same parties or parties in privity with them on the same cause of action. (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 340.) “The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so.” (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 284 at p. 824.) For purposes of res judicata, California applies the primary right theory to define cause of action as: (1) a primary right possessed by the plaintiff, (2) a corresponding duty imposed upon the defendant, and (3) a wrong done by the defendant which is a breach of such primary right and duty. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795; *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 285-286.)

Thus, in California a single cause of action is based on the harm suffered, rather than on the particular legal theory asserted or relief sought by the plaintiff. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954-955, disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4; *Slater v. Blackwood*, *supra*, 15 Cal.3d at p. 795.) “Where, as here, an action is filed in a California state court and the defendant claims the suit is barred by a final federal judgment, California law will determine the res judicata effect of the prior federal court judgment on the basis of whether the federal and state actions involve the same primary right. [Citation.]” (*Gamble v. General Foods Corp.* (1991) 229 Cal.App.3d 893, 898.)

In contrast, “the clear trend in the most recent [federal] decisions, in harmony with such procedural notions as the ‘transaction or occurrence’ test for compulsory counterclaims as stated in USCS Rules of Civil Procedure, Rule 13(a) and the ‘common

nucleus of operative fact’ standard for pendent federal jurisdiction of *United Mine Workers v. Gibbs* (1966) 383 U.S. 715, ... has been towards the adoption of § 24 of the Restatement 2d of Judgments, which sets forth a ‘transactional analysis’ as to what constitutes a ‘claim,’ the extinguishment of which prohibits subsequent litigation with respect to the transaction(s) from which it arose (§ 8[a]).” (82 A.L.R.Fed. 829, § 2[a] at p. 837.) The transactional analysis test examines whether the claims in question arise from the *same* “essential or operative facts and issues.” (82 A.L.R.Fed. 829, § 7[a] at p. 861.)

As noted above, the trial court sustained the demurrer as to all respondents on the ground that appellant had not stated a valid cause of action because his claim was barred by the doctrine of res judicata. However, it is clear from the court’s remarks that it was actually applying the transactional analysis theory of res judicata used in federal courts, rather than the primary rights theory properly used in California courts. In particular, the court stated: “I believe [plaintiff’s attorney] is correct about the primary rights theory as the basis rather than the transactional. I still, however, believe that res judicata does apply here. *The underlying facts that – that support it are identical.* I think what we simply have here is the same primary rights being asserted, under different theories and under the different laws, one being breach of contract, primarily in the federal action and breach of fiduciary duty here.” (Emphasis added.)

The trial court’s analysis turned on the similarity of the facts underlying the claims in question. Thus, the trial court was in reality applying the transactional analysis test, rather than the primary rights test. In applying the primary rights test, the appropriate focus is analyzing the harm the particular cause of action seeks to vindicate, not whether the same facts support the claims.

We find that the primary right claimed by appellant under his federal breach of implied contract claim was his right to perform under the implied contract, while the primary right claimed under his breach of fiduciary duty claim was his right as a minority shareholder not to have the value of his share of the corporation diminished by the actions of the remaining shareholders as directors. The corresponding duty imposed

upon the individual respondents, then, was the duty to refrain from taking any actions that would reduce the value of his share.

Another way of approaching the primary rights test is to ask whether appellant could have brought either claim separately. In other words, if a person was employed by a corporation, but was not a shareholder in the corporation, whether he could bring an action for breach of implied contract. Conversely, if he was not employed by the corporation, but was a shareholder in the corporation, whether he could bring an action for breach of fiduciary duty. The answer in both cases is yes, which demonstrates to this court that two distinct primary rights are involved. We therefore hold that appellant's claim of breach of fiduciary duty is not barred by the doctrine of res judicata.

C. Issue Preclusion Does Not Prevent Jardine From Bringing His Claim.

Respondents argue collateral estoppel also precludes Jardine from bringing his present claim since the issues upon which he bases his claim were previously decided by the federal court. The court in *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 874, set out the test used to determine whether issue preclusion applies: “[A] party will be collaterally estopped from relitigating an issue only if (1) the issue decided in a prior adjudication is identical with that presented in the action in question; *and* (2) there was a final judgment on the merits; *and* (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication.” (Emphasis in original.) Here, only the third prong of the test is met.

In support of his present claim, Jardine alleges that, among other things, the individual respondents turned over control of the Beach Boys' business of public appearances and concerts to Love, granted an exclusive license to Love to use the Beach Boys' name, intentionally usurped Jardine's share of the profits from public appearances and concerts in which he did not perform, authorized and prosecuted the federal lawsuit against Jardine, and intentionally failed to distribute Jardine's share of a settlement in an unrelated action with the intention of using it as leverage in the ongoing dispute. In

reaching its decision on Jardine's breach of implied contract claim, the federal court did not find that any of the above allegations were untrue. Instead, the court based its decision upon the single finding that there was no employment relationship between Jardine and BRI.

Respondents now claim, however, that the absence of an implied employment contract means neither BRI nor the individual respondents had any obligation to permit him to tour with the group, or pay him whether he toured or not. To the contrary, in its opinion the federal court expressly acknowledges the existence of "the 1993 agreement on distribution of touring receipts when not all of the owners toured."

Respondents next argue that the federal court decided the issue as to whether BRI acted improperly in turning over touring as The Beach Boys to Love. However, when citing the federal court's decision, respondents omit the one sentence that is fatal to their argument. The court dismissed Jardine's "unclean hands" affirmative defense because it was not supported by the facts, stating "*Love is not a defendant, and he is the one who refused to tour with Jardine.*" (Emphasis added.) The court further noted that BRI's grant of an exclusive license to Love was not cited in support of Jardine's unclean hands affirmative defense, and therefore was not considered by the court when reaching its decision. In contrast, Love *is* named as a defendant in the present case, and BRI's grant of the exclusive license to Love is one of the actions upon which Jardine bases his present claim.

Finally, respondents offer no authority for their argument that because BRI prevailed in the federal court action, Jardine cannot now claim respondents' motive in pursuing the action was improper. Further, the citation offered by respondents in support of their argument that Civil Code section 47, subdivision (b)(2) makes the filing of a lawsuit absolutely privileged is incomplete. The complete citation is "*Defensive pleading, including the assertion of affirmative defenses, is communication protected by the absolute litigation privilege.* Such pleading, even though allegedly false, interposed in bad faith, or even asserted for inappropriate purposes, cannot be used as the basis for allegations of ongoing bad faith. No complaint can be grounded upon this pleading."

(*California Physicians' Service v. Superior Court* (1992) 9 Cal.App.4th 1321, 1330; emphasis added.) Jardine's present claim is not based upon any defensive pleading by BRI in the previous action, and respondents' argument fails.

Thus, the first and second prongs of the collateral estoppel test are not met, and Jardine is not estopped from presenting those issues now.

D. Jardine May Bring A Claim Against The Individual Respondents and BRI For Breach Of Fiduciary Duty.

Finally, respondents contend that Jardine cannot bring a claim for breach of fiduciary duty against either the individual respondents or BRI. As set forth below, we disagree.

With respect to Jardine's claim against the individual respondents, they assert he cannot state a claim as a matter of law because Jardine is an "equal" shareholder in BRI in view of the fact he and the individual respondents each own 25 percent of the stock in the company. Contrary to respondent's claim, determining whether someone is a majority, minority or equal shareholder for a breach of fiduciary duty claim does not turn *solely* on the amount of stock owned. A "minority shareholder" is one who "owns less than half the total shares outstanding and thus cannot control the corporation's management or singlehandedly elect directors." (See Black's Law Dict. (7th ed. 1999) p. 1381, col. 1.) A court must look at the corporate shareholders as a whole and determine which persons are directing corporate activities. The majority shareholder can either be a single shareholder or a group of shareholders "*acting in concert to accomplish a joint purpose.*" (*Jones v. HF Ahmanson* (1969) 1 Cal.3d 93, 108, emphasis added; *see also Waller v. Truck Insurance Exchange, Inc.* (1995) 11 Cal.4th 1, 11 [plaintiff, a 40 percent shareholder held to be minority shareholder in a corporation with four shareholders; the controlling shareholders, three persons acting jointly, held 60 percent of the stock, 20 percent each]; *Stumpf v. Stumpf & Sons, Inc.* (1975) 47 Cal.App.3d 230, 232 [in a close corporation owned by three equal shareholders, the plaintiff, one third owner, was held to

be a minority shareholder]; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 134-135 [the court held that even though no single shareholder owned a majority of the corporation's stock, the plaintiffs were the minority shareholders, owning 48 percent of the shares].)

Here, Jardine has alleged the individual respondent shareholders, Love, B. Wilson, M. Wilson, and Gudvi are acting together to control the management of BRI and as such they may be considered “majority” shareholders of BRI and therefore, Jardine is the “minority” shareholder of BRI for the purposes of this claim.

Moreover, there is no question that a minority shareholder may assert a cause of action against the controlling majority shareholders for breach of fiduciary duty. The fiduciary duties of majority shareholders in California was clearly enumerated in *Jones v. HF Ahmanson*:

“[m]ajority shareholders, either singly or acting in concert to accomplish a joint purpose, have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities to benefit themselves or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business.” (*Ahmanson, supra*, 1 Cal.3d at p. 108.)

“[The majorities’] dealings with the minority shareholders are subject to rigorous scrutiny. Where any of their contracts or engagements with the minority is challenged, the burden is on the director or stockholder not only to prove the good faith of the transaction, but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. ““The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm’s length bargain. If it does not, equity will set it aside.”” (*Lynch v. Cook* (1983) 148 Cal.App.3d 1072, 1082 citations omitted; see also *Efron v. Kalmanovitz* (1964) 226 Cal.App.2d 546, 557.) Thus,

the majority shareholders do in fact owe a fiduciary duty to the minority shareholder. Consequently, Jardine may bring a claim against the individual respondents for breach of that duty.

This notwithstanding, as currently pled, Jardine has not stated a breach of fiduciary duty claim against BRI. We cannot say as a matter of law, however, there is no theory upon which Jardine may be able to assert a claim.

DISPOSITION

The judgment is reversed and this matter is remanded to the trial court for further proceedings. On remand the trial court is directed to vacate its order sustaining the demurrer on the fiduciary duty cause of action against the respondents and to enter a new and different order: (1) overruling the individual respondents' demurrer on the fiduciary duty cause of action; and (2) sustaining respondent BRI's demurrer with leave to amend. (See Code Civ. Proc., § 472c, subd. (a) [propriety of granting leave to amend complaint is open on appeal even though no request to amend such pleading was made].)

This opinion has no effect on the trial court's order sustaining the demurrer on the declaratory relief cause of action.

Appellant is awarded costs on appeal.

WOODS, J.

We concur:

PERLUSS, P.J.

JOHNSON, J.